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Trade unions and the whistleblowing process in the UK: An opportunity for strategic expansion?

Abstract

Historically, whistleblowing research has predominantly focused on psychological and organisational conditions of raising concerns about alleged wrongdoing. Today, however, policy makers increasingly start to look at institutional frameworks for protecting whistleblowers and responding to their concerns. This article focuses on the latter by exploring the roles that trade unions might adopt in order to improve responsiveness in the whistleblowing process.

Research has consistently demonstrated that the two main reasons that deter people from reporting perceived wrongdoing are fear of retaliation and a belief that the wrongdoing is unlikely to be rectified. In this article we argue that trade unions have an important part to play in dealing with both these inhibiting factors but this requires them to be appropriately engaged in the whistleblowing process and willing to take a more proactive approach to negotiations. We use Vandekerckhove's 3-tiered whistleblowing model and Kaine's model of union voice level to structure our speculative analysis of the various ways in which trade unions can interact with whistleblowers and organisations they raise concerns about alleged wrongdoing in, as well as agents at a regulatory level. Our articulation of specific roles trade unions can play in the whistleblowing process uses examples from the UK as to how these trade union roles are currently linked to and embedded in employment law and whistleblowing regulation.

KEYWORDS: successful whistleblowing, unions, voice, whistleblowing

1. Introduction

Historically, workers have joined trade unions in order to obtain some collective power. More recently, they have had additional reasons for doing so, for example, to access individual representation at disciplinary and grievance etc hearings and to utilise legal, financial and insurance services. The purpose of this article is to explore the possibility of trade unions adopting a more expansive role in a society which has become, at least on paper (Lewis 2008), more favourably disposed towards whistleblowing. We define whistleblowing as ‘the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action’ (Near & Miceli 1985: 4). There is wide consensus within the whistleblowing literature around this definition which covers both internal and external whistleblowing (Brown et al 2014). In the voice literature however, whistleblowing is almost always understood as external voice (Detert & Burris 2007, Pohler & Luchak 2014). Within the whistleblowing literature discussions around a more restrictive definition (e.g. Jubb 1999) have been countered by arguing that nearly all external whistleblowing is preceded by internally raising concern about wrongdoing outside of the normal hierarchical line, and thus internal and external whistleblowing belong to the same process (Miceli et al 2008, Vandekerckhove 2006). Research has consistently demonstrated that the two main reasons that deter people from reporting perceived wrongdoing are fear of retaliation and a belief that the wrongdoing is unlikely to be rectified (Brown 2008, Miceli et al 2008). The voice literature provides similar explanations, namely that employees are unwilling to speak-up when they believe it is too risky to do so or perceive doing so would be futile (Detert & Edmondson 2011, Morrison 2011).

Historically whistleblowing research has predominantly focused on psychological and organisational conditions of raising concerns about alleged wrongdoing (Mesmer-Magnus & Viswesvaran 2005, Miceli et al 2008, Vandekerckhove et al 2014). Today however, with many countries having whistleblower protection legislation, policy makers increasingly start to look at institutional frameworks for protecting whistleblowers and responding to their concerns. This article contributes to the latter focus. It explores what roles an existing element of the institutional framework - i.e. trade unions - could assume in order to improve responsiveness in the whistleblowing process. This process can be analysed from a wide range of perspectives, for example, voice (Hirschman 1970); organisational citizenship (Organ 1988); principled organisational dissent (Miceli et al, 2008) and the risk society (Beck 1992). However, we think that the practical impact of power resources and institutional arrangements are particularly relevant here. Power resources affect a person's decision-making possibilities and the impact of the choices they make at the workplace. Turning to institutional arrangements, Skivenes and Trygstad (2014) suggest that labour market models with different approaches to worker representation and human resource management create different frameworks for whistleblowing. They argue that institutional arrangements, for example collective bargaining and consultation with trade union representatives, can provide counterbalancing mechanisms that reduce the effect of individual power resources.

In this article we argue that trade unions have an important part to play in dealing with both these inhibiting factors but this requires them to engage in particular ways in the whistleblowing process and willing to take a more proactive approach to negotiations. More precisely, we use the 3-tiered whistleblowing model (Vandekerckhove 2010) - internal, external, public – and a union voice level model (Kaine 2014) – individual, workplace, industry, national, supra-national - to structure our speculative analysis of the various ways in which trade unions can interact with whistleblowers and organisations they raise concerns

about alleged wrongdoing in. Because the structures of trade unions allow them to have a presence at all three tiers, the 3-tiered model allows us to distinguish and articulate specific roles trade unions can play in the whistleblowing process. We provide examples from the UK as to how these trade union roles are currently linked to and embedded in employment law and whistleblowing regulation.

The article is structured as follows. The next section argues the relevance of our attempt to explore a more expansive role for trade unions with regard to whistleblowing. We follow this with a review of the sparse literature on trade union activity with regard to whistleblowing. Section four presents the union voice in whistleblowing model based on a voice level model (Kaine 2014) and a whistleblowing regulation model (Vandekerckhove 2010). We then provide three sections in which we articulate the possible roles of trade unions in the whistleblowing process at different levels. We argue that unions could be involved in a range of matters, for example: ensuring that employers have appropriate whistleblowing policies and agreed procedures, the provision of advice and representation to members who are actual or potential whistleblowers or are the subject of allegations, checking that identified wrongdoing is dealt with, protection against victimization, and the monitoring and review of arrangements.

2. Is there a gap to be filled?

Before discussing these possibilities in detail, we will endeavour to explain why we think workers, employers and society generally would gain from trade unions assuming a more active role.

Staff are often in a good position to identify workplace wrongdoing and, as vital sources of information, should be encouraged to speak up. Current UK statutory provisions contained in Part IVA Employment Rights Act 1996 (ERA 1996) and employer procedures give primacy to the internal reporting of alleged wrongdoing but there has been little discussion about trade unions as recipients of concerns. We examine below the practical and legal implications of designating lay officials as potential internal recipients but it is important to note here that we think it undesirable to have only one whistleblowing representative. Although it might be useful to have a specialist lead official at a workplace (as with health and safety representatives), members should be given choices about who to approach. Indeed, union officials handle all kinds of concerns about alleged wrongdoing as part of their normal day-to-day activities. In this sense, whistleblowing is only exceptional in that members can raise wider issues in circumstances where they may have a statutory right to report externally. In addition, we explain why it is important for unions to acquire the status of designated external recipients under an agreed procedure rather than listed as prescribed persons under Part IVA ERA 1996. This in turn raises the broader issue of what contractual and legislative changes are needed to enable unions both to protect their members as well as ensure that wrongdoing is rectified. What we are envisaging here is that workers will acquire rights through terms incorporated into individual contracts of employment from collectively agreed whistleblowing arrangements.

UK trade unions have extensive experience of protecting their officials and members from victimisation, whether this takes the form of general bullying or harassment or targeted reprisals for engaging in safety awareness activities or other union activities. What is different today is that Part IVA ERA 1996 allows workers to raise concerns about alleged wrongdoing about a wide range of matters that may or may not impact on the workplace. Put simply, instead of being in the firing line of employers for carrying out ‘normal’ workplace

activities, members may choose to put their head above the parapet in order to raise wider issues, for example, about the improper behaviour of contractors or suppliers, environmental damage, or miscarriages of justice. Given the factors known to inhibit potential whistleblowing, we argue that not only do members require clear advice about how to speak up and the consequences of doing so but they also need to be assured that unions will exert pressure to ensure that allegations are investigated and corrective action taken where appropriate. Again, this is familiar territory in relation to cases of bullying and harassment and other health and safety issues but may be more difficult to achieve in relation to financial wrongdoing by the employer or alleged improper behaviour on the part of other persons or organisations which occurs away from the workplace.

Safe and effective reporting of alleged wrongdoing is not just important at the workplace because malpractice can and does occur in all walks of life. Current UK employment legislation only protects workers (Part IVA Employment Rights Act 1996). However, freedom of expression is generally recognised as being crucial to the health of democratic societies and citizens generally have the right to receive and impart information under Article 10 of the European Convention on Human Rights. At a time when people are being encouraged to report concerns, for example about healthcare provision, bribery and corruption, we believe that the trade union movement has a golden opportunity to demonstrate their worth by acting more strategically in this respect (Hyman 2007) when people want to report alleged workplace wrongdoing.

3. What does the literature suggest about the role unions can have in the whistleblowing process?

While much attention has focused on making it safe for people to raise a concern, Near and Miceli (1995) point out that it is just as important to make whistleblowing more effective. This they define as 'the extent to which the questionable or wrongful practice (or omission) is terminated at least partly because of whistleblowing and within a reasonable time frame' (p 681). Vandekerckhove et al (2014: 306) define successful whistleblowing as raising a concern that results in 'managerial responsiveness to the primary concerns about alleged wrongdoing aired by the whistleblower about wrongdoing; and managerial ability or willingness to refrain from, or protect the whistleblower against, retaliation or reprisals for having aired those concerns'. In terms of current whistleblowing research, trade unions have been neglected as organisations that can not only receive concerns about alleged wrongdoing but may also be able to effect action to stop wrongdoing.

Existing research in the UK shows unions are frequently used by whistleblowers as a recipient but not as a first port of call and with mixed results. Lewis et al (2015) conducted surveys of NHS Trusts staff and Primary Care staff in England for the Freedom to Speak Up Review. For NHS whistleblowers who participated in the survey, trade union was the second most used source of advice before blowing the whistle internally, after seeking advice from a work colleague. For Primary Care staff it was the fourth most important source of advice, after work colleague, professional body, and friend/relative. When asked who they approached when raising their concern externally, the participating NHS Trust whistleblowers ranked a trade union as the second most common recipient, after professional bodies. For participating primary care whistleblowers, trade unions ranked third, after professional bodies and regulators. In their study of 1,000 cases from the Public Concern at Work (PCAW) advice line data, Vandekerckhove and James (2013) discovered that those who raised their concern about alleged wrongdoing with a trade union had aired it with others beforehand. A possible explanation is that workers turn to a union because of the negative

reactions they receive from people in their organisation when raising a concern internally (Near and Miceli 1996). As regards matters that are not core union issues (for example, environmental or consumer issues), Vandekerckhove and James (2013) suggest that workers may raise their concerns about alleged wrongdoing with a union because they lack trust in successful internal whistleblowing. In relation to how successful whistleblowing to a union was, their findings showed that it was safer for whistleblowers to raise a concern with a union than it is to other recipients. However, the findings also suggest that raising a concern with a union is less effective in stopping the wrongdoing than using other external or internal recipients. Vandekerckhove and Rumyantseva (2014) report that whistleblower interviewees expressed disappointment about raising their concern with their union. An interviewee with experience as a union representative stated that union officials predominantly see whistleblower cases only as employment disputes and, as such, taking these up may require too many resources for a very uncertain outcome. Hence, although the literature on whistleblowing and unions is scarce, it suggests that the task for unions is not simply to show that they can protect their members but to demonstrate to wider society that they are effective in ensuring that allegations of wrongdoing are taken seriously and that malpractices are appropriately dealt with. Skivenes and Trygstad (2010) have used both the high unionisation rate in Norway as well as the fact that trade union involvement is firmly institutionalised to explain the high level of successful whistleblowing in that country.

Brinsfield (2014) reviews literature on the effects of employee voice mechanisms. Although these do not include whistleblowing procedures, employee voice mechanisms correlate positively with employee's expectation of problem resolution, and negatively with employee turnover. Addison and Belfield (2003) argue that rather than collective voice, it is individual voice that lowers the risk of workers quitting. Nevertheless, unions might not have to move away from their traditional struggle for collective voice. Kaine (2014: 176) asserts



that there are examples emerging which ‘demonstrate an increasing willingness by unions to experiment with innovative regulatory regimes.’ We assert here that whistleblowing policies and procedures might be one such ‘innovative regime’. Lewis (2006) found that whistleblowing procedures are likely to be more influential if unions played a part in developing them and have their support. However, in a review of official guidelines for whistleblowing policies, Vandekerckhove and Lewis (2012) found that only the British Standards Institute (BSI 2008) advises organisations to consult with unions on the matter. Again, the limited literature on the role of unions in the whistleblowing process resonates with the gap in the literature that voice scholars point out. For example, Budd (2014: 484) notes that ‘the weakening of the hard law of the state can potentially be offset by bolstering the regulatory role of [...] workers themselves.’

This implies unions could also play a role in campaigning at a national or international level, e.g. for whistleblower protection or for creating a positive public perception of whistleblowers. Although in the UK, the TUC is listed as a draft committee member for both BSI (2008) and the Whistleblowing Code of Practice (PCaW 2013a), there is no explicit union campaigning in favour of whistleblowers. Vandekerckhove (2006) found that in only two countries were unions at the forefront of campaigning for better whistleblower protection: Canada and the Netherlands. In contrast, Katz and Lenglet (2010) write that French unions see whistleblowing policies as an icon of Anglo-Saxon models of transparency, which they fear hinder their union mission as representatives of the employees. Since whistleblowing is acknowledged by political and financial institutions throughout the world as being an effective tool in the fight against corruption (Carr & Lewis 2010), unions might work internationally on an issue that has recognised global significance and such activity could co-ordinated through the ITUC, ETUC or International Labour Organisation.

4. Trade union voice in the 3-tiered whistleblowing model

Kaine (2014) offers a critical discussion of Freeman and Medoff's (1984) assertion that unions have two main functions or faces – monopoly of labour and collective voice – and posits a model of different levels and methods of union voice. Kaine (2014: 175) asserts that unions do provide voice at individual level but this may 'require unions to call on the collective power of their membership, at a workplace (or occasionally) higher level.' This leads Kaine to view unions as a system of multi-level governance, meaning that 'the levels are not mutually exclusive and that, being multi-scalar, union voice is a richly textured phenomenon' (Kaine 2014: 175). The levels Kaine analytically distinguishes are: individual, workplace, industry, national, and supra-national. This framework allows Kaine to make sense of cases where unions have engaged in innovative methods to regulate conditions of employment beyond the bounds of conventional collective bargaining. In doing so, Kaine (2014) suggests possible future forms of union representation that could tackle the challenges to traditional notions. In this article we speculate about the enhanced role unions could play in bringing about more successful whistleblowing.

Vandekerckhove (2010) posits a 3-tiered model of whistleblowing regulation. This model is based on a study of legislative developments in the 1990s in Australia and the UK, and has found its way into the Council of Europe Recommendation on Whistleblower Protection (CoE 2014). Hence, Vandekerckhove's model does not depict actions from the point of view of unions. The 3-tiered model maintains a balance between, on the one hand, the public disclosure of information about organisational wrongdoing (i.e. the public's right to know) and, on the other hand, the organisation's interest in keeping such information out of the public realm. At the first tier, which is internal, workers raise their concerns about alleged wrongdoing with supervisors, top management, board members, or other designated persons (e.g. ethics officer, compliance manager, internal audit). At the second tier, the whistleblower

raises his/her concern externally to a regulator or  any agent acting on behalf of the wider society. However, the public would not know the whistle had been blown to that external recipient. Still, this second tier recipient is expected to investigate and take action in relation to the organization where the wrongdoing allegedly occurred. The third tier involves recipients that can ensure that the information and any allegation the whistleblower makes become known to the wider public via the media. This model, when implemented in whistleblower protection legislation – for which the Council of Europe Recommendation (2014) offers principles – would grant a whistleblower protection when they report a concern  internally (tier 1), to a regulator when the organization fails to act or retaliates (tier 2), and to the public (tier 3) if the regulator fails to act or the matter is urgent. Hence, the philosophy of the 3-tiered model is not that organisations become directly accountable to the wider society for their practices, but that they are held accountable for dealing adequately with concerns about alleged wrongdoing raised with them and the persons raising them, i.e. successful whistleblowing.

As the aim of this article is to explore a more pro-active role from trade unions in successful whistleblowing, figure 1 merges the models by Kaine (2014) and Vandekerckhove (2010) into one model on union voice in whistleblowing.

----- figure 1 here -----

In the remainder of this article we discuss possible actions by trade unions and union representatives using the model presented in figure 1. As Kaine (2014) points out, union voice is multi-scalar. Vandekerckhove's (2010) model however has levels with clear boundaries. Hence some union voice methods identified by Kaine (2014) at the workplace

and industry level cross whistleblowing levels in the Vandekerckhove (2010) model. As our discussion will make clear, we believe that the importance of unions in accomplishing successful whistleblowing is precisely that trade unions have the potential to play a role across different whistleblowing levels. Institutionally speaking, this is unique and offers potential for consistent and continuous support for whistleblowers to safeguard their rights and see that their concerns about alleged wrongdoing are addressed.

5. Tier 1 – Individual and Workplace

One function of trade unions is to provide representation for members. They are experienced in acting on behalf of both accuser and accused at the workplace, for example a harassed person and a harasser, and this is a role they may well have to play in whistleblowing cases. This should not pose particular difficulties except where an individual insists on remedial action being taken in response to a finding of wrongdoing which the union thinks may damage its wider membership. For example, if it is established that an employer is polluting the local environment, a member who is confident about obtaining alternative employment may push for a plant to be shut. Unsurprisingly, a union might wish to negotiate a less draconian solution which provides the maximum possible job security. Negotiating solutions to workplace problems is the bread and butter of trade unions and the principle of majority rule is difficult to challenge (see for example the approach of the Court of Appeal in *Iwanuszezak v GMB [1988] IRLR 219*). However, a complicating factor here is that if a worker suspects or knows about wrongdoing and is not satisfied with an internal deal he or she may be willing to make an external disclosure. If there is a serious risk that such reporting could result in an outside agency insisting on a complete closure of the business, might a union be tempted to collude with an employer to inhibit external whistleblowing?

Nevertheless, it seems highly unlikely that a union rulebook would ever allow a union to discipline a member for exercising or threatening to exercise a statutory right.

If employers or unions mislead or attempt to put pressure on a worker in relation to a genuine concern, that person's trust in the whistleblowing arrangements is likely to be undermined. Indeed, as mentioned earlier, fear of retaliation is one of the main reasons potential whistleblowers choose not to report concerns about alleged wrongdoing. In order to deal with this, unions should ensure that employers treat the victimization of a whistleblower as a serious disciplinary offence and that any detriment suffered is removed as soon as possible. Nevertheless, it would be naive to ignore the fact that, in the harsh reality of industrial life, individuals are sometimes sacrificed in the interests of the majority. From a legal perspective, it should be noted that Part IVA Section 47B(1A) ERA 1996 makes workers as well as employers liable for detriments imposed on the ground that a protected disclosure has been made. Although threats or attempts to make a disclosure are not expressly covered, it can be argued that employers who victimise a worker for making such a threat or attempt are likely to breach the implied term of trust and confidence which exists in all contracts of employment. An employee who resigned in response to such a breach (and had two years' service) might claim unfair constructive dismissal and, although Part IVA would not apply, an employer would have the unenviable task of having to offer a potentially fair reason for dismissal and satisfying an employment tribunal that it was reasonable to sack in the circumstances.

The BSI Code of Practice on Whistleblowing Arrangements (BSI 2008) emphasises the value to organisations of providing effective policies and procedures. The business case could not be put more simply: if employers are able to identify problems early and deal with them appropriately they are better able to run their organisations efficiently. Conversely, if workers are fearful about raising a concern they may choose to keep quiet about something that might

threaten the organisation's viability, perhaps because a serious risk materialises or the issue is raised externally and damages the employer's reputation. To the extent that workers' jobs and conditions of employment depend on the success of their employers, unions and their members can also benefit from a culture of reporting wrongdoing. However, despite this element of common interest, there are plenty of areas where management and unions might take a different approach which leaves considerable scope for collective bargaining. It almost goes without saying that trade unions would prefer to negotiate with employers rather than simply be consulted because the latter process allows employers to reject representations. Nevertheless, it is consultation that is encouraged in Principle 16 of The Council of Europe Recommendation on Protection of Whistleblowers (CoE 2014).

Introducing and maintaining a culture of open or confidential reporting requires leadership from the top of the organisation. Thus we think it is appropriate that, after consultation with trade unions, senior management should take sole responsibility for the whistleblowing policy. Nevertheless, trade unions will want to ensure that the messages conveyed in the policy are consistent with the arrangements for its implementation. Since unions are experienced at negotiating a variety of workplace procedures, for example, disciplinary, grievance, equal opportunities, health and safety, it seems logical that they should extend their remit into the field of whistleblowing. A particular benefit of doing so would be to ensure that inter-relationships and potential problems of overlap could be addressed, as well as whether a whistleblowing procedure could be used after a different procedure has been exhausted. Inter-relationships arise from the fact that disciplinary procedures may need to be invoked to deal with people who knowingly supply false information or victimise a whistleblower. As regards overlap, it may well be that workers believe that their concern could be processed through either a specific (for example, an equal opportunities, health and safety) procedure or a generic one (for example, grievance or

whistleblowing) for dealing with alleged wrongdoing. Thus employers and trade unions might see value in providing designated persons who can offer advice about the appropriateness of using a particular procedure. It needs to be acknowledged that there are occasions when grievances are not just personal disputes but may have broader implications for others. For example, an isolated incident of bullying may be regarded as a private matter but if it is the context of a culture of workplace harassment then it can be argued that there is a public interest dimension (Lewis 2015). It is sometimes argued that workers should not be offered “two bites of the procedural cherry”. However, many organisations would prefer people with unresolved concerns about alleged wrongdoing to air them through an alternative internal procedure rather than externally. In addition to the question of how a whistleblowing procedure fits in with other workplace arrangements, there are a range of other detailed matters of both a principled and practical nature that provide opportunities for negotiation. It is to these that we now turn.

A fundamental matter that employers and unions will need to address is the question of the rights and duties of those covered by the whistleblowing arrangements. A contractual right to report is likely to send out the positive message that disclosures of wrongdoing are encouraged but unions should resist a reciprocal duty. Statutory obligations to disclose already exist under health and safety (Regulation 14 of the Management of Health and Safety Regulations 1999), money laundering and anti-terrorism legislation (Proceeds of Crime Act 2002) and imposing a contractual duty in relation to other forms of wrongdoing is unlikely to be helpful. For example, workers may be anxious about not fulfilling their duty and raise concerns about alleged wrongdoing without having any reasonable grounds for doing so. In addition, industrial relations problems might arise if it emerges after a disclosure has been made that other workers with access to the same information did not report (Tsahuridu & Vandekerckhove 2008, Vandekerckhove & Tsahuridu 2010). Is it a good use of time and

resources to investigate how many people were in breach of the duty to report and what might be the effect of imposing sanctions on large numbers of workers? We believe that trade unions should take a firm position on this and accept that, assuming that the whistleblowing procedure provides proper safeguards for those who choose to speak up, an expectation of reporting is legitimate but not a contractual obligation.

Related to this is the critical issue of the rights and duties of trade unions themselves. We discuss below the opportunity to advise and represent members but a basic question is whether unions should seek designation as recipients of concerns. One argument against lay officials being identified as potential internal recipients is that this would give them a management role. Some have asserted that they would not want this role or be capable of performing it because it would require them to make a preliminary assessment about allegations, take responsibility for any investigations and any appropriate remedial action. On the other side of the coin, it can be argued that union members normally take their concerns about alleged wrongdoing about workplace matters to their local representatives and that whistleblowing arrangements should allow workers to report wrongdoing internally via mechanisms they are comfortable with. Since research consistently demonstrates that people initially raise concerns about alleged wrongdoing with their line manager (Brown et al 2014), we are not suggesting that trade unions should become the first port of call. However, unions may feel it appropriate to negotiate a procedure which allows concerns about alleged wrongdoing to be raised with lay officials if a member is not happy with the response of management. It would be open to negotiation as to whether concerns about alleged wrongdoing can be raised with local union representatives after they have been raised with line management or only after higher management has been involved. A major advantage would be that the union officials would be alerted to a potential problem and could endeavour to deal with it even if the member subsequently decided not to pursue the matter. Indeed, it is

perfectly possible that an individual will become fearful about being identified as a whistleblower but lay officials believe the concern needs to be raised because of its potential effect on others. For this to work, the procedure would have to allow not only for concerns about alleged wrongdoing to be raised with local officials but for union representatives to take these up with management. Thus, as with concerns about health and safety matters, the local official might make an initial assessment of any allegations made and, if appropriate, would refer them to management to investigate etc. In these circumstances both union members and officials would be protected. In addition to the statutory protection provided by Section 43C(2) ERA 1996 (disclosure in accordance with the employer's procedure) and perhaps as employees under Sections 44 and 100 ERA 1996 in health and safety cases, both union member and official might argue that the collectively agreed procedure afforded them the contractual right to raise a concern. The union official might also assert that Sections 146 & 152 TULRCA 1992 (covering activities undertaken within working hours), which offers redress for detriments suffered "on grounds related to" trade union activities, apply.

6. Tier 2 – Workplace and Industry

In the UK, external whistleblowing to unions would not be protected under Section 43F Part IVA ERA 1996 because they are not listed as prescribed persons (other than some professional bodies). Thus, unless the detailed requirements of Sections 43G or H ERA 1996 ('disclosure in other cases' and 'disclosure of exceptionally serious failure' respectively) are satisfied, there is currently no *specific* protection under Part IVA ERA 1996 for workers who disclose information to trade unions. However, this situation is radically altered if a procedure allows reports of wrongdoing to be made externally to a union because workers would be protected again by a contractual right and Section 43 (2) ERA 1996.

We do not think it appropriate or necessary for trade unions to seek to be listed as prescribed persons under Section 43F ERA 1996. Those who are currently prescribed in the Regulations are often industry regulators with the power to investigate and take remedial action where necessary. We believe that the role of unions should not be to investigate concerns about alleged wrongdoing but to ensure that others deal with them properly. In our opinion, it is vitally important for trade unions to negotiate procedures that designate them as both internal (lay officials) and external (the union nationally) recipients of concerns. If this was achieved, members who were not satisfied with how a concern had been handled internally (or did not know owing to lack of feedback) would be protected if they referred the matter to union headquarters. Since the focus of this article is on trade unions we have not dealt specifically with the position of non-members. However, given that disclosure of information to trade unions will be voluntary and that there are other potential recipients of concerns, we do not believe that any issue arises about non-members being subjected to a detriment for the purpose of compelling them to become a member within the meaning of Section 146 TULRCA 1992. Members would not need to identify an appropriate prescribed person under the Regulations (which can be a difficult task, see Phillips and Lewis 2013) and would not need to fulfil the Section 43F ERA 1996 requirement of reasonably believing that the information is “substantially true” and in the public interest (see below). From an employer perspective, if unions were treated as appropriate external recipients organisations might reduce the risk of potentially damaging wider disclosures. In particular, it would make it difficult for workers to justify disclosures to the media if the employer had encouraged them to use the option of reporting wrongdoing to their union. However, a member might wish to make an external disclosure under Section 43G or 43H ERA 1996 if he or she believed that, despite the union’s involvement, the concern had not been dealt with satisfactorily.

An important discussion for unions relates to the coverage of a whistleblowing procedure. Only workers are protected by the current UK statutory provisions yet other people may want to raise concerns. Kaine (2014) gives an example of how unions targeted different companies within a supply chain to achieve better conditions for outsourced cleaners. Hence, by moving their efforts up from a workplace to an industry level, it would be possible for unions to devise arrangements that offer some contractual security to self-employed people, agency workers, and volunteers. In addition, unions might be keen to establish the principle that sub-contractors of the organisation are required to negotiate, implement and monitor their own whistleblowing procedure.


It is important in the context of whistleblowing that workers receive good advice and counselling on both legal and practical matters. Even if lay representatives were not designated as potential recipients of concerns, unions could safeguard their members by negotiating protection equivalent to that contained in Section 43D ERA 1996 ('disclosure to a legal adviser'). Thus workers who sought advice from lay officials might be protected by a contractual provision to that effect and those who sought legal advice from the union lawyers would be covered by Section 43D ERA 1996. This is an important matter because, without such a provision, information disclosed externally for the purpose of obtaining non-legal advice would have to satisfy the requirements of Section 43G or 43H ERA 1996. Workers need to be offered guidance about a range of potentially contentious matters. For example, the legal requirement to have a reasonable belief without conducting their own investigations, whether their disclosure is likely to satisfy the public interest test, and the relevance of good faith. We believe that trade unions should negotiate arrangements that encourage staff to raise concerns about alleged wrongdoing when they have a 'reasonable suspicion' (see *Bolton School v Evans*[2006] IRLR 500). In terms of non-legal issues, unions can provide practical assistance in drafting letters about concerns and may feel it appropriate

to counsel against further personal involvement by a member on the grounds of the stress being experienced or anticipated. The availability of union advice and counselling would also have advantages for employers as representatives would be obliged to warn about a range of matters. For example, the lack of protection for disclosures not made in accordance with the relevant statutory and contractual provisions, the problems involved in maintaining anonymity or confidentiality, and any sanctions likely to be imposed for false and malicious disclosures.

The most positive way of dealing with conflicting interests at the workplace is to ensure that appropriate dispute resolution mechanisms are in place. Currently employment tribunals in whistleblowing cases are only empowered to adjudicate on whether workers have suffered detriment and to afford remedies if they have. They cannot investigate whether in fact wrongdoing has incurred and, if so, order rectification. Thus workers and unions who are keen to ensure that wrongdoing is dealt with may be willing to participate in alternative processes (Lewis 2013). Mediation may well be appropriate as it might enable employers, unions and individuals to reach an acceptable solution in situations where wrongdoing cannot be stopped immediately or only with serious negative consequences for those involved (see the example given above about an employer polluting). Although mediation can facilitate the reconciliation of diverse interests, it is accepted that private mediation may not take account of the public interest (other than through the resolution of the dispute itself). However, we would argue the public interest is in the eye of the beholder and that it is not something that is normally taken into account by private sector employers who have to give priority to the interests of their shareholders. Indeed, whether or not wrongdoing has been dealt with, the need to promote shareholder interests can put pressure on companies to conceal the very fact that it has occurred.

7. Tier 3 – Industry, National, Supra-National

Although the data available in the UK (PCaW 2013b) suggests that only 0.3% of those who raise a concern about alleged wrongdoing ultimately take it to the media, we believe trade unions could play a role here as well. In the UK, PIDA protects workers who make a disclosure to the public as a last resort or when lives are at immediate risk. Trade unions could advise whistleblowers about whether or not they fulfil these criteria. Where they do, trade unions could offer further support by channeling the whistleblower to an appropriate media outlet, aid the whistleblower in making their story credible, or put them in contact with a journalist who might want to pick up their story. It is a misconception that whistleblowing to the media is the easiest way to get heard. Often journalists are not interested in writing about the concern raised with them, or they want to give it a spin that suits the media ownership but not the whistleblower (van Es & Smit 2003).

Trade unions might also opt to act in their own right as spokesperson for a whistleblower without disclosing his or her  identity. Indeed, they might want to do so as a way of protecting a whistleblower. This could also be a good option where a number of similar concerns about alleged wrongdoing were raised with them. Finally, they might want to do so in order to reiterate a previously publicised but yet unresolved concern.

A third way in which trade unions can take up a role at the third or public whistleblowing tier is a more indirect but important one. Trade unions could easily pool expertise and use their institutional as well as political affiliations to lobby for legislative changes. In the UK, the whistleblowing statute was welcomed by trade unions but there was no explicit campaign for such a measure. Likewise, the TUC was represented on the British Standards Institute steering committee which produced guidance on whistleblowing in 2008 as well as a member of the Whistleblowing Commission established by PCAW (2013c) which developed its own

Code of Practice. However, we can only speculate about why there is no vocal and explicit call from the trade union movement for the production of a statutory Code of Practice (Lewis 2008). A public campaign for improved whistleblowing legislation might reinforce the notion that speaking up about wrongdoing is in society's interest and the higher profile of trade unions on this issue might encourage individuals to raise their concerns.

Unions could try to influence policy standards at a supra-national level in a similar way. The authors of this article were involved in stakeholder roundtables drafting the Council of Europe Recommendation (CoE 2014). The only participant from the union side was from the FNV union federation in the Netherlands. Other intergovernmental bodies (e.g. UN) are also producing reports and policies on the matter. These will ultimately shape policy at a national level. We believe it is useful – like with the Council of Europe Recommendation – to ensure the supra-national policies foresee a space for unions to play a role at national policy making level. This can already be secured by lobbying at supra-national level.

8. CONCLUSION

Trade unions have a vitally important role to play in ensuring that appropriate whistleblowing arrangements are introduced, applied and reviewed. Not only will they be advising and representing their members but their endorsement as to what amounts to wrongdoing and how concerns about alleged wrongdoing should be raised and handled, will be critical in encouraging staff to raise concerns. Although there is currently no research evidence to prove it, it is tempting to assume that members are more likely to raise a concern in a union environment and that employers are more likely to respond appropriately if there is a strong union presence at the workplace. However, if unions wish to assert their credentials as champions of freedom of speech (and recruit on the back of this) there are a number of

obvious steps that need to be taken. The overall objective would be to demonstrate to the wider society that the function of unions is not simply protecting the interests of their members but to ensure that wrongdoing is exposed and dealt with properly.

First, it needs to be acknowledged that unions are being asked to perform an additional and more demanding role which will inevitably require extra training and resources. However, employers have a strong interest in ensuring that union representatives can perform effectively within their whistleblowing arrangements and may be willing to provide facilities for training. Indeed, many employers find that there are advantages in holding management training sessions with union representatives present so that both sides can appreciate the roles played by the other. Second, unions need to be seen as model employers themselves and should negotiate with their own staff about the introduction and maintenance of procedures that comply with best practice. Third, unions will need to build a reservoir of specialist expertise and resources in order to provide a good service to their members. Thus they might establish a whistleblowing ‘helpline’ to provide advice (and a ‘hotline’ if the union was a designated recipient of concerns), build up databases of model procedures as well as case studies on both effective and ineffective whistleblowing. Fourthly, to make life easier for themselves and their members unions need to consider campaigning both at national and international level. At national level, union federations such as the TUC in the UK or the FNV in the Netherlands might be pressed to co-ordinate a campaign in support of improved statutory provisions. In addition to the issues already discussed in this article, there are many others that could be taken up. These include lobbying for: a legal duty on all employers to establish and maintain whistleblowing procedures and consult with employee representatives about their implementation, monitoring and review; the introduction of a binding Code that outlines best practice; the removal of the public interest test; a requirement on regulators to investigate concerns about alleged wrongdoing within their remit and to pass on to

appropriate bodies those that are not; the possibility of bringing class actions and the establishing an overarching whistleblowing agency. At international level, the European TUC and ILO might be urged to ensure that appropriate legal instruments are introduced in other countries so that best practice in whistleblowing arrangements can be promoted throughout the globe.

We appreciate that in times of austerity the priorities of trade unions are likely to be the defence and creation of jobs. However, we argue that there is a new legal and moral climate relating to whistleblowing which is evidenced by responses to scandals in the financial and healthcare sectors, the disclosures by Wikileaks and Edward Snowden as well as legislation. We believe that this provides unions with an opportunity to be more proactive. By doing so we believe that they could not only recruit more widely but improve their image in society. One obvious way forward would be to both assert and demonstrate that dealing with organizational whistleblowing is central to trade union activity as it affects working conditions. While generally sceptical about the wholesale adoption of partnership initiatives, we do not think that serving as the collective voice of their members is incompatible with a constructive approach to the management of whistleblowing and whistleblowers. In essence, we are advocating the building of union organisations on the back of freedom of expression and information issues. The creation of appropriate whistleblowing procedures can be used to educate workers about how to communicate safely and effectively in order to address a problem. This may involve unlearning in the sense that the traditional approaches to “snitches, sneaks and ratting” need to be rejected. Indeed, if members understand the importance of whistleblowing it will be easier to ask them to engage in collective action if necessary to ensure that disclosers of information are protected and wrongdoing is rectified. By taking initiatives to ensure that effective whistleblowing arrangements are available and kept under review both inside and outside of the workplace, we would argue that trade unions

might be seen to be more relevant to both current and potential members as well as society generally. This may involve coalition building with other social movements (Frege and Kelly 2003), for example, anti-corruption agencies and environmental campaigners, which, in turn might broaden the appeal of trade unions. In this respect with think it fitting to end with the words of Richard Hyman:

There are opportunities for policies which appeal to new working class constituencies (or often, old sections whose interests have hitherto been neglected); for initiatives which address members' interests outside the workplace and thus provide a fertile basis for transcending particularistic employment identities; and for programmes which link workers' interests as producers and consumers (as, for example, in demands for the improvement of public health care) so as to enable the construction of new types of encompassing and solidaristic alliances. (Hyman 1991: 5-6)

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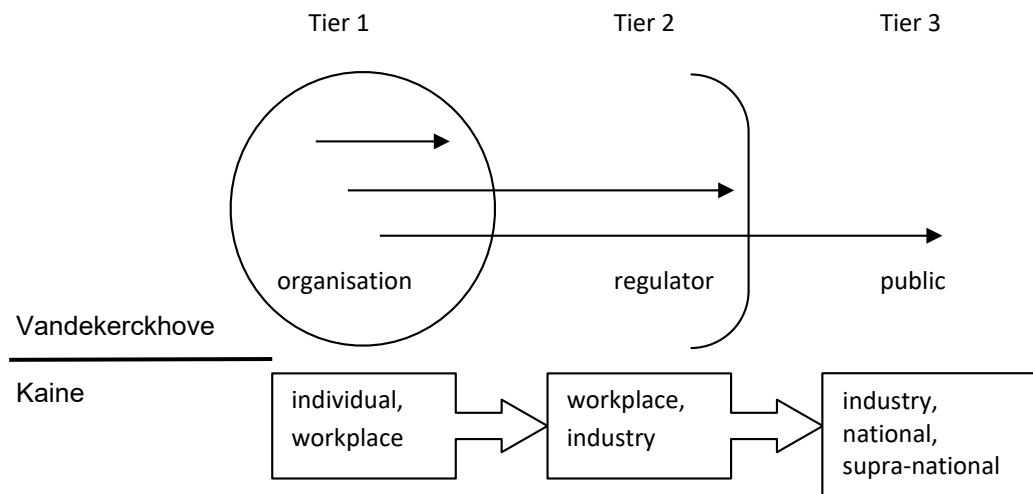


Fig 1. Union voice levels and the 3-tiered whistleblowing model